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October 8, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand

Elizabeth Beaty
Federal Communications Commission
Cable Services Bureau
2033 M Street, NW, 8th Floor
Washington, DC 20554

Re: *Ex Parte* Communication in CS Docket No 97-98

Dear Ms. Beaty:

An *ex parte* presentation made by the New England Electric System ("NEES") on September 25, 1998 makes claims, which are incorrect

First, it asserts that cable operators have a choice of location on the pole. Contrary to NEES' claim that the placement of cable attachments in a separate communications zone is an affirmative "choice" by cable operators resulting in the creation of the 40-inch neutral zone, the establishment of a separate communications zone was a historic choice made by electric utilities and their telephone joint owners/users, dating back decades, before the existence of cable. Accordingly, it would be factually incorrect to attribute the existence of the neutral zone to cable attachers and eliminate the neutral zone from usable space. This historical and continuing requirement cannot be undone by NEES fiat, and fails to justify treatment of the neutral zone as non-usable space. Attached is a portion of the brief filed by cable operators in the Massachusetts case, *A-R Cable Services, Inc. v. Massachusetts Electric Co.*, D.T.E. 98-52 (complaint filed May 15, 1998) ("the Massachusetts case") in which NEES makes this claim, which demonstrates that NEES' position is incorrect. The current FCC formula has gone a long way to promoting the use of surplus pole space for facilities-based competition, and there is no evidence that the "pole resource" has been constrained by the formula. Instead, the electric utilities have documented the growth in height (and useable space) of these poles

Second, NEES asserts that the top of the pole is unuseable. Pole top space is included in usable space under the rate formula adopted by the FCC, however, and NEES' position repeatedly has been rejected by the FCC in light of evidence that utilities use pole top extenders and pole top

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pins to make the pole top usable.[1] Just last year, the New York Public Service Commission rejected similar arguments by electric utilities.[2] Attached is a portion of the brief filed in the Massachusetts case in which NEES is making this claim, which demonstrates that this claim is incorrect.

Third, NEES cites certain authority it believes to be supportive of its position. Close examination of the authorities relied upon by NEES, however, demonstrates that they do not support NEES' position: two of the cited authorities are dissents in state public service commission cases and do not represent decisions of the public service commissions; two of the cited state decisions involve state formulae based on statutes that specifically did not adopt the FCC formula; and one cited decision was vacated and comes from a state that is not a "certified" state which regulates pole attachments. In sum, NEES' reliance upon out of state authority in support of its position on usable space is misplaced and should be disregarded by the Commission. Moreover, attached is a portion of the brief filed in the Massachusetts case in which NEES is making this claim, which illustrates in more detail how NEES' claim is incorrect.

Sincerely,

William D. Durand
Executive Vice President
Chief Counsel

Enclosures

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[1] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket 78-144, 68 F.C.C.2d 1585 (1978) (First Report and Order); 72 F.C.C.2d 59 (1979) (Memorandum Opinion and Second Report and Order); 77 F.C.C.2d 187 (1980) (Memorandum Opinion and Order); *Teleprompter Corp. v. Florida Power & Light Co.*, 49 R.R.2d 1484 (1981), *review denied*, 54 R.R.2d 1391 (1983); *Alert Cable TV of North Carolina v. Carolina Telephone & Telegraph Co.*, PA-79-0028, Mimeo No. 002015 (July 15, 1981); *American Television & Communications Corp. v. Carolina Power & Light Co* , PA-80-0013, Mimeo No. 002011 (July 17, 1981).

[2] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n Case No 95-C-0341 (Issued and effective June 17, 1997).

BEFORE THE
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

A-R CABLE SERVICES, INC. A-R CABLE PARTNERS CABLEVISION OF FRAMINGHAM, INC. CHARTER COMMUNICATIONS GREATER WORCESTER CABLEVISION, INC. MEDIAONE OF MASSACHUSETTS, INC. MEDIAONE OF PIONEER VALLEY, INC. MEDIAONE OF SOUTHERN NEW ENGLAND, INC. MEDIAONE OF WESTERN NEW ENGLAND, INC. MEDIAONE ENTERPRISES, INC. MEDIAONE OF NEW ENGLAND, INC PEGASUS COMMUNICATIONS TIME WARNER CABLE *Complainants*, v. MASSACHUSETTS ELECTRIC COMPANY *Respondent.*	D.T.E. 98-52

INITIAL BRIEF OF A-R CABLE SERVICES, INC., ET ALS., COMPLAINANTS

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Dated: September 17, 1998

example, the cable television operator has no definite right to any space on the pole; must pay to make poles ready for attachment; must be licensed pole by pole; and generally may be displaced if the utility pole owner decides that it needs the space By contrast, utilities provide each other with a standard pole or normal pole with sufficient height, strength and space to accommodate the joint use of the pole by both utilities. Massachusetts Electric's pole attachment agreement forces onto cable extraordinarily large, virtually limitless liability in connection with the very limited pole attachment license it is granted. (Exhibit CABLE-3 at Exhibit 2 art. XIII). Massachusetts Electric's cable agreement also forces the cable operator to fully indemnify the power company for activities associated with the cable television pole attachments. *Id.* By contrast, a joint use agreement will typically set forth a reasonable and equitable division of liabilities in particular circumstances. For example, most joint use agreements provide that each party is responsible for injuries caused solely by that party's actions, and that each party will pay for damages to its property and injuries to its employees when caused by the concurrent negligence of both parties. (Exhibit CABLE-1 at 28, 29).

These are some of the broader factual and policy considerations which also entered into the FCC's adoption of the use ratio of 1/13.5, within which is the determination that usable space is all of the space above minimum grade clearance. (Exhibit CABLE-1 at 29). All of these factual and policy considerations are present in this case and further support the Department's continued reliance upon the usable space approach taken in the *Cablevision of Boston* decision.

c. Massachusetts Electric's Theory that Cable has Chosen to Build in a Separate Communications Zone is Fiction

Massachusetts Electric has claimed that the placement of cable attachments in a separate

communications zone was an affirmative "choice" by cable operators which resulted in the "creation" of the 40-inch neutral zone, and, therefore, justifies treatment of the neutral zone as non-usable space. Massachusetts Electric has further implied that the neutral zone would not exist, but for cable, and that because cable selected communications space for its attachments based on economic considerations, Massachusetts Electric has been forced to have a neutral zone on its poles. (Exhibit MECo-13 at 5).

In fact, the communications space and neutral zone preceded the existence of cable attachments and cable operators have never been afforded any choice whether to locate in the communications space on Massachusetts Electric's poles. (Tr. 1 at 109). The establishment of a separate communications zone was an historic choice made by electric utilities and their telephone joint owners/users, dating back decades, before the existence of cable. (Exhibit CABLE-1 at 27; Exhibit MECo-13; Tr. 1 at 111). Better than 90% of cable attachments are on poles owned jointly by Massachusetts Electric and Bell Atlantic (Exhibit MECo-13 at 13), in which those parties' joint ownership agreements have prescribed a separate communications space. (Exhibit DTE-19, MECo Response to CABLE-1, art.9). This assignment is still a matter of contract and Code. The Massachusetts Electric/Bell Atlantic joint pole agreement continues to require it. The NESC today continues to require it, and will not be up for revision until 2007, at best, according to Massachusetts Electric's own NESC expert Mr. Clapp. (Tr. 1 at 114-115). The BellCore Blue Book, incorporated in pole agreements and local cable license agreements, also requires it. (Tr. 1 at 97). This historical and continuing requirement cannot be undone by Massachusetts Electric fiat or its fanciful spin doctoring.

Under the standard pole license agreements, cable operators are told by the pole owners

where to attach. (Tr. 1 at 97). The "three way" agreements with Bell Atlantic specifically require the placement of cable in the communications zone.[16] (Tr. 1 at 97). The newer "two way" agreements with Massachusetts Electric give the Company the power to tell cable exactly where to go on the pole. (Tr. 2 at 65-69). As a result, every single cable attachment by Complainants is in the communications zone in Massachusetts. (Tr. 1 at 97; Tr. 2 at 45-46).

Prior to 1993, the use of power supply space was not even an option under the NESC. (Tr. 1 at 113-115; Tr. 2 at 44-45). Since 1993, it has not been an option under Massachusetts Electric's or Bell Atlantic's standard practices. (Tr. 2 at 45-46). Even under Massachusetts Electric's new "policy" (promulgated after the *Cablevision of Boston* decision), which allows the Company to construct fiber optic cable for the use by others in the power supply space on its poles (Exhibit CABLE-11), the placement of cable television distribution plant outside of the communications zone and in power supply space is prohibited.[17] (Tr. 1 at 115-117). This new policy, which Mr. Anundson testified was under development for over one year (Tr. 2 at 57, 58), clearly was not designed to give cable operators the option of attaching their coaxial cable or hybrid fiber coaxial plant in the power supply space—such technologies are excluded from the power supply space under the Massachusetts Electric policy. (Exhibit CABLE-11, Attachment at 1; Tr. 2 at 47-48). Nor is it clear that Bell Atlantic would permit cable attachments in power supply space on jointly-owned poles. In any event, Massachusetts Electric's new policy would

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[16] All but two pole attachment agreements between Complainants and Massachusetts Electric are "three way" agreements. (Tr. 1 at 73-74).

[17] Indeed, even if Massachusetts Electric were to allow cable attachments outside of the communications zone, the reality of pole attachment practices is that attaching parties cannot simply locate their facilities at different heights on a pole-to-pole basis. (Tr. 1 at 97-98).

not provide any real benefit to cable operators because they generally expand plant capacity by placing facilities on existing strand. (Tr. 1 at 66).

Massachusetts Electric has also argued that cable operators have derived an economic advantage by utilizing the communications space because they are able to use different personnel than the Company uses. (Exhibit MECo-13 at 9). However, the record does not support these arguments. First, Massachusetts Electric has not addressed that cable attachers had no choice in the matter and were located in the communications space by the pole owners—the Company itself and Bell Atlantic. Second, Massachusetts Electric has neither quantified this alleged economic benefit nor measured such alleged economic benefit against the historical and ongoing burdens of makeready which the cable industry has absorbed since the time that cable networks were first constructed.

Contrary to Massachusetts Electric's claims, the evidence demonstrates that cable has never had a choice between communications space and power supply space. Accordingly, it would be factually incorrect to attribute the existence of the neutral zone to cable attachers and eliminate the neutral zone from usable space. Nor is the assignment of the neutral zone to attachers warranted on the record on the basis that they have derived economic benefit from being forced by pole owners to utilize communications space on the poles and pay decades of makeready.

d. Pole Tops Are Treated as Usable Space Under the FCC and DTE Formula

Massachusetts Electric incorrectly has excluded from usable space the top five inches (0.42 feet) of each pole. (Exhibit MECo-13 at 14-15; Exhibit CABLE-17 at 2). Pole top space is

included in usable space under the rate formula adopted by the FCC and applied recently by the Department in *Cablevision of Boston,* in which the Department rejected Boston Edison's proposed exclusion of eight inches of pole top space. (Exhibit CABLE-1 at 22-23; Exhibit CABLE-19; Tr. 1 at 102). Massachusetts Electric's position has been repeatedly rejected by the FCC in light of evidence that utilities use pole top extenders and pole top pins to make the pole top usable.[18] Just last year, the New York Public Service Commission rejected similar arguments by electric utilities.[19] This is another instance in which Massachusetts Electric has admitted to not following the FCC/Department usable space directives (Exhibit CABLE-17 at 2), failed to rebut the usable space presumption and, in fact, tried to overturn the usable space component of FCC/Department pole attachment rate formula.

e. The Department Should Not Change its Application of the FCC Formula With Regard to Pole Tops in This Proceeding

Despite vigorous contentions by Boston Edison that the pole top should be treated as unusable (Exhibit CABLE-19), the Department decided in *Cablevision of Boston* to adopt the 13.5-foot usable space presumption consistent with the FCC formula. *Cablevision of Boston* at 40-44. Massachusetts Electric has failed to identify any supportable reasons why the Department

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[18] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket 78-144, 68 F.C.C.2d 1585 (1978) (First Report and Order); 72 F.C.C.2d 59 (1979) (Memorandum Opinion and Second Report and Order); 77 F.C.C.2d 187 (1980) (Memorandum Opinion and Order); *Teleprompter Corp. v. Florida Power & Light Co.*, 49 R.R.2d 1484 (1981), *review denied*, 54 R.R.2d 1391 (1983); *Alert Cable TV of North Carolina v. Carolina Telephone & Telegraph Co.*, PA-79-0028, Mimeo No. 002015 (July 15, 1981); *American Television & Communications Corp. v. Carolina Power & Light Co.*, PA-80-0013, Mimeo No. 002011 (July 17, 1981).

[19] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n Case No. 95-C-0341 (Issued and effective June 17, 1997).

should not follow that assignment in this, and in any future, proceeding. Principles of reasoned consistency compel the continued inclusion of pole tops within usable space.

As with the neutral zone discussed above, assignment of pole top space to usable space under the *Cablevision of Boston* decision is entirely consistent with the Massachusetts Pole Attachment Statute and the Department's regulations. *See* G.L. c. 166, § 25A (1998). Under Section 25A, usable space includes "the total space which would be available for attachments . . . upon a pole above the lowest permissible point of attachment of a wire or cable." The definition of "attachment" in Section 25A includes pole top pins and extenders, thereby supporting the Department's treatment of pole top space as usable. Indeed, the evidence supplied by Massachusetts Electric in discovery demonstrates that it places pole top pins and pole top extenders on the top of its poles and makes use of space above pole tops for its own attachments. In discovery and through its expert, Mr. Clapp, Massachusetts Electric has admitted that it makes use of pole top extenders to place wires above the top of poles, thereby making better use of the usable space. (Tr. 1 at 67; Tr. 1 at 133-136). Its Construction Manual is replete with illustrations showing their use. (Exhibit CABLE-1 at 22 and PG-5). Its Account 364 includes an over $9 million investment in pole top pins or brackets, and pole top extenders. (Exhibit MECo-13 at 155, DMW-1 at 6). Not only has Massachusetts Electric demonstrated that it uses pole top pins and extenders, it has shown that such use is of significant benefit to the Company. Indeed, Massachusetts Electric's use of pole top pins and extenders creates additional height above grade for its conductors (Tr. 1 at 69-70, 134-136), which, in turn, facilitates Massachusetts Electric compliance with safety code requirements mandating adequate clearance between primary and secondary conductors. (Tr. 1 at 135-136). Based upon the record, the top five inches (0.42 feet)

of Massachusetts Electric's poles should be deemed usable. The same factual basis which led the FCC and other state commissions to include pole tops within usable space exists here, just as it did in the *Cablevision of Boston* case.

f. Massachusetts Electric's Arguments for Exclusion of Pole Tops From Usable Space are Without Merit and Would Defeat the Department's Goal of a Self-Executing Rate Formula

If the Department were to accept the theory animating Massachusetts Electric's argument to eliminate five inches of pole top space from usable space, the same logic necessarily would require the Department to reduce the allocation ratio used to determine a cable operator's costs for attaching to a utility pole. Massachusetts Electric attaches brackets and through-bolts five to six inches below the pole top to attach pole top extenders and pole top pins on its poles. (Exhibit MECo-13 at 14-15, 50-51). Massachusetts Electric claims, however, that the five inches above these brackets is not usable because Massachusetts Electric does not attach brackets or through-bolts at that height due to problems with wood splitting. *Id.* Following Massachusetts Electric's reasoning, cable operator attachments should only be deemed to "use" 1-1/2 inches of space on a pole—rather than 12 inches—because the bracket necessary to support cable facilities only occupies 1-1/2 inches of pole space. The remaining 10-1/2 inches is not used by cable television attachments and the costs for that space should not specifically be assigned to the cable operator. A consistent application of this "actual use" theory would result in a use ratio of 1-1/2 inches/9 feet (1.39%) for cable attachments, which is far less than the Department's accepted allocation ratio of 1 foot/13.5 feet (7.41%). While such a result would be consistent with Massachusetts Electric's reasoning, it would contradict the regulatory assignments already investigated and endorsed by the FCC and this Department.

BEFORE THE
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

A-R CABLE SERVICES, INC. A-R CABLE PARTNERS CABLEVISION OF FRAMINGHAM, INC. CHARTER COMMUNICATIONS GREATER WORCESTER CABLEVISION, INC. MEDIAONE OF MASSACHUSETTS, INC. MEDIAONE OF PIONEER VALLEY, INC. MEDIAONE OF SOUTHERN NEW ENGLAND, INC. MEDIAONE OF WESTERN NEW ENGLAND, INC. MEDIAONE ENTERPRISES, INC. MEDIAONE OF NEW ENGLAND, INC. PEGASUS COMMUNICATIONS TIME WARNER CABLE *Complainants,* v. MASSACHUSETTS ELECTRIC COMPANY *Respondent.*	D.T.E. 98-52

REPLY BRIEF OF A-R CABLE SERVICES, INC., ET ALS

By their attorneys,

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Dated: October 5, 1998

Department ignore its recent decision in *Cablevision of Boston* in determining the pole attachment rates of Massachusetts Electric.

II. ARGUMENT

A. Usable Space

1. Pole Tops

Without reference to a single legal decision in support of its position, and without addressing the body of precedent that contradicts its position, Massachusetts Electric maintains that pole tops should be excluded from usable space. It claims that this exclusion is supported by the language of the Massachusetts Pole Attachment Statute. (MECo Brief at 6,7). Complainants have addressed Massachusetts Electric's position in their Initial Brief. (Complainants' Brief at 26-29). As a policy matter, the Department should continue to apply the pole attachment rate formula which it recently adopted in *Cablevision of Boston*, in which it declined to exclude pole tops from usable space. Reasoned consistency requires the application of the *Cablevision of Boston* approach in this proceeding.[1]

2. Neutral Zone

Massachusetts Electric has continued to ignore the requirements established by the Department in *Cablevision of Boston* that it (1) adhere to the usable space approach employed by the FCC and (2) not base its proposed rates upon changes in that approach that may be under consideration by the FCC as a result of utility industry rulemaking requests. (MECo Brief at 7-12). During hearings, Massachusetts Electric admitted to its departure from the FCC's usable

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[1] Even decisions of other Commissions which Massachusetts Electric appended to its Initial Brief include pole tops in usable space.

space approach (Exhibit CABLE-17 at 2) and thereby effectively conceded its noncompliance with the Department's directives in *Cablevision of Boston.* On brief, Massachusetts Electric has argued for exactly what the Department stated it would not consider - changes in the FCC formula that the utility industry has requested the FCC to adopt, but which remain pending in a rulemaking at the FCC. (MECo Brief at 12). Complainants have addressed these noncompliant aspects of Massachusetts Electric's rate proposal in their Initial Brief and need not reargue the point here. (Complainants' Brief at 15-18). As a matter of reasoned consistency, and for the legal and policy grounds discussed by the Complainants in their Initial Brief, the Department should adhere to its decision in *Cablevision of Boston* in determining the pole attachment rates of Massachusetts Electric.

Massachusetts Electric has argued that on one hand, the neutral zone is never part of usable space and, on the other, that its exclusion of the neutral zone overcomes the rebuttable presumption of 13.5 feet established by the FCC and adopted by the Department in *Cablevision of Boston*. (MECo Brief at 7-11). Massachusetts Electric is wrong on both counts. First, Complainants have explained that the exclusion of the neutral zone does not constitute a rebuttal of the 13.5 foot usable space presumption and instead represents a frontal assault on the usable space portion of the FCC/Department pole attachment rate formula. (Complainants' Brief at 16,17). Second, such an exclusion is fundamentally inconsistent with the usable space approach employed by the FCC and adopted recently by the Department.

In support of its position, Massachusetts Electric has relied upon actions taken in a handful of states, all the while conceding that "...other jurisdictions, for various reasons, [have] taken an approach more akin to that suggested by Complainants...." (MECo Brief at 7-11). Of

critical importance to this case is that one of the "other jurisdictions" is Massachusetts! Moreover, Massachusetts Electric chose not to address directly the more recent state and federal decisions and legislative determinations which support the Department's position in *Cablevision of Boston* regarding usable space.[2] When combined with the FCC's approach (which covers 31 states) and the approach taken by other states, the *Cablevision of Boston* decision's treatment of usable space is widely accepted and supported by the weight of authority at state and federal levels.

Furthermore, on close examination of the authorities relied upon by Massachusetts Electric, the Department should find that they do not support Massachusetts Electric's position. First, in two instances of claimed support for its position (Illinois and Michigan), Massachusetts Electric relies upon dissents. (MECo Brief at 11.12). These dissents do not represent the decisions of the public service commissions. Second, the Company's reliance upon authority from Maine is misplaced and misleading. The Maine Public Utilities Commission adopted a rate formula under a state statute, 35-A M.R.S.§ 711, as amended by St. 1991, c. 708, § 1, which specifically did not adopt or require adoption of any components of the FCC formula. In actual application, moreover, the Maine formula has offsetting adjustments which Massachusetts Electric failed to mention. For example, Massachusetts Electric failed to explain that in Maine

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[2] *Cal. Pub Util. Code 767.5 (1996). In the Matter of Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues, N.Y. Public Service Comm'n. Case No. 95-C-0341 (issued and effective June 17, 1997). Consumers Power Co., et als, Mich. Pub. Serv. Comm'n Case Nos. U-10741, U-10816, U-10831 at 27 (Feb. 11, 1997), rehearing denied (April 24, 1997). Ohio Edison Co., et al., No. 81-1171-EL-AIR (Ohio Pub. Serv. Comm'n Nov. 3, 1982). Application of Southern New England Telephone Co To Amend Its Rates and Rate Structure, 1993 Conn. PUC LEXIS 5 (July 7, 1993)(assigning neutral zone to usable space).*

(1) the rate base is not calculated as total investment over total poles, but is reduced to estimate the cost for a shorter pole; and (2) the Maine Commission may alter the amount of usable space to include all space where streetlighting, transformers and other attachments are placed by the electric utility.[3] *See, Chapter 880, Maine Public Utilities Commission Regulations*. As a result, not one rate in Maine rises to the excessive level proposed by Massachusetts Electric.[4] Massachusetts Electric has distorted the Maine approach by cherrypicking from it a single element in order to create in Massachusetts a pole rate that would be inconsistent with pole rates in Maine.

Similarly, the 1982 decision of the Kentucky Public Service Commission is not controlling or even persuasive here. In contrast to the situation in Massachusetts, where the Department derives its authority under a specific state statute with a "usable space" formulation consistent with that followed by the FCC, the Kentucky Commission acted without any similar statutory parameter. *Kentucky CATV Association v. Volz, 675 S.W.2d 393 (Ky. App.1983).* Reliance by this Department upon the Kentucky Commission decision would be inconsistent

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[3] This point demonstrates why reasoned consistency requires the continued application of *Cablevision of Boston*. Attachers cannot be required to adhere to Department precedent and then be deprived of a reasonable opportunity to create the type of record that would be appropriate if that precedent were to be suddenly changed. *New England Telephone and Telegraph Company v. Department of Public Utilities*, 371 Mass. 67 (1976). (When a major change in a regulatory standard is in prospect in a rate proceeding, there should be sufficient warning to enable parties to adjust their practices and proof to the new situations).

[4] The Department may take notice of or incorporate by reference in this docket the national survey of pole attachment rates which was admitted into the record in *Cablevision of Boston* as PG-13 to Exhibit CABLE-1. Per that survey, Bangor Hydro's solely owned pole rate is $9.50, Maine Public Service Co.'s is $7.78 and a solely owned Central Maine Power pole used by Bell Atlantic, cable and the utility is $6.62.

with and conflict with the decisional principles adopted by the Department in *Cablevision of Boston,* decided only a few months ago.

The 1981 decision of the Wisconsin Public Service Commission is also unpersuasive. Massachusetts Electric has failed to disclose (and may be unaware) that Wisconsin is not a "certified" state which regulates pole attachments. A court reversed the Wisconsin Public Service Commission's rule on March 8, 1982, and jurisdiction over pole attachments in Wisconsin has since been with the FCC. *FCC Public Notice, Mimeo 3094 (March 31, 1982)* (removing Wisconsin from the list of certified states); *States that Have Certified That They Regulate Pole Attachments, 7 FCC Rcd 1498; 1992 FCC LEXIS 931 (February 21, 1992)* (Wisconsin not among currently certified states). Even if the Department were to take the Wisconsin decision into account, that decision is unpersuasive and does not afford the basis for a change in Department precedent. It was made without any input or participation by the Wisconsin Cable Communications Association, which had asked that pole attachment fee issues be dealt with outside of a pending utility rate case so that it could present an industry position on those issues. The Wisconsin Commission's terse discussion of the entire pole rate formula in one paragraph does not afford a reasoned basis for the Department to reverse the *Cablevision of Boston* decision.

In sum, Massachusetts Electric's reliance upon out of state authority in support of its position on usable space- a position that conflicts with the FCC formula adopted by the Department in *Cablevision of Boston*- is misplaced and should be disregarded by the Department.

CERTIFICATE OF SERVICE

I, Connie M. Simmons, do hereby certify that a copy of the foregoing was mailed, first-class mail, postage prepaid this 8th day of October, 1998 to the following:

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